United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

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76-6151

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

NO. 76-6151

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P/S

CHARLES R. HARARY,

Plaintiff-Appellant,

versus

WILLIAM E. SIMON, Secretary of the Treasury of the United States of America,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York

BRIEF FOR PLAINTIFF-APPELLANT

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CHARLES R. HARARY,
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versus

WILLIAM E. SIMON, SECRETARY
OF THE TREASURY OF THE
UNITED STATES OF AMERICA
Defendant-Appellee

On Appeal from the United States District Court
for the Southern District of New York

BRIEF FOR PLAINTIFF-APPELLANT CHARLES R. HARARY

MAY IT PLEASE THE COURT:

PRELIMINARY STATEMENT

Charles R. Harary appeals from an order entered on July 28, 1976 by the Honorable Thomas P. Griesa, United States District Judge, granting the Secretary of the Treasury's motion for summary judgment on cross motions for summary judgment filed by Harary and the Secretary. The Complaint filed below on December 30, 1974 sought judicial review of final agency action, namely, the permanent disbarment of Mr. Harary, a Certified Public Accountant, from practicing before the Internal Revenue Service. The disbarment took effect on June 17, 1974 when the Secretary of the Treasury

affirmed the decision of the Administrative Law Judge who, following the filing of a formal Complaint by the Director of Practice of the IRS and an administrative hearing, ordered the disbarment. The disciplinary proceedings which culminated in the disbarment were instituted shortly after Mr. Harary's acquittal on a charge of bribing an Internal Revenue Agent, and conspiracy so to do and this Court's reversal of his conviction on the lesser included charge of paying a gratuity to the Agent and its entry of an order directing the dismissal of the indictment. U.S. v. Harary 457 F. 2d 471 (2d Cir. 1972). The facts underlying the disbarment are precisely those which gave rise to the criminal charges previously considered by the Court.

ISSUES PRESENTED FOR REVIEW

1. Whether the IRS was collaterally estopped from disciplining Mr. Harary on the basis of allegations which were put in issue and determined in Mr. Harary's favor in a prior criminal proceeding.
2. Should not the determination that the IRS engaged in entrapment of Mr. Harary preclude its disbarment of him based upon the very conduct as to which he was entrapped.
3. Whether the allegations of fact contained in Paragraph IV of the administrative complaint constitute conduct for which one can be disciplined under 31 CFR 10.22 (c).
4. Whether as applied to the facts of this case, 31 CFR 10.22 (c) sets forth a constitutionally permissible standard

of conduct the violation of which constitutes grounds for disbarment from practice before the Internal Revenue Service.

STATEMENT OF THE CASE

A. Procedural Background

On December 23, 1970, plaintiff was charged in a three-count indictment in the Southern District of New York with (1) conspiring to bribe a special agent of the Internal Revenue Service in violation of 18 U.S.C. 371, (2) bribing said agent in violation of 18 U.S.C. 201 (b), and (3) paying said agent a gratuity in violation of 18 U.S.C. 201 (f) (6a)*.

On June 4, 1971, after a trial before United States District Judge Charles Metzner and a jury at which the sole defense was entrapment, plaintiff was acquitted of the conspiracy and bribery charges and found guilty of the gratuity charge. The judgment of conviction was entered on August 17, 1971.

On February 28, 1972, the United States Court of Appeals for the Second Circuit reversed the conviction and ordered the indictment dismissed on the grounds that the lesser included offense, i.e., the gratuity count, should not have been submitted to the jury over Harary's objections (216a).

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* References in parenthesis are to Plaintiff-Appellant's appendix.

On November 24, 1972, the Director of Practice of the United States Treasury Department filed a Complaint pursuant to 31 C.F.R. 1054 of Treasury Department Circular No. 230 seeking to disbar Plaintiff Harary from further practice before the Internal Revenue Service, predicated on the precise conduct which was the subject of the above-described criminal proceedings (242a).

The administrative Complaint was based upon two alleged violations of 31 C.F.R. 10.51 (f)* (Paragraphs II and III) and an additional violation of 31 C.F.R. 10.22 (c)** and 31 C.F.R. 10.52*** (Paragraph IV). In essence

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* Section 10.51(f) states:

Disreputable conduct for which an attorney, certified public accountant, or enrolled agent may be disbarred or suspended from practice before the Internal Revenue Service includes, but is not limited to:

* * *

(f) Directly or indirectly attempting to influence, or offering or agreeing to attempt to influence, the official action of any officer or employee of the Internal Revenue Service by the use of threats, false accusations, duress or coercion, by the offer of any special inducement or promise of advantage or by the bestowing of any gift, favor or thing of value.

** Section 10.22(c) states:

Each attorney, certified public accountant, or enrolled agent shall exercise due diligence.

* * *

(c) In determining the correctness of oral or written representations made by him to clients with reference to any matter administered by the Internal Revenue Service.

*** Section 10.52 states:

Any attorney, certified public accountant, or enrolled agent may be disbarred or suspended from practice before the Internal Revenue Service for willful violation of any of the regulations contained in this part.

Paragraph II alleged:

> On or about the 22nd day of September, 1970, Respondent attempted to influence Internal Revenue Agent Lawrence Ostrow, an employee of the Internal Revenue Service, in an official action involving the conduct of income tax audits of Sutton and Sutton, Ltd., on the short year corporate tax return of Sutton and Sutton, Ltd., from July 21, 1967, to August 31, 1967, and on the corporate tax return of Sutton and Sutton, Ltd., for the fiscal year ended August 31, 1968, by offering Ostrow money in the amount of $1,250.00.

Paragraph III alleged:

> That Respondent from on or about the first day of September, 1970 up to and including the 22nd day of September, 1970, agreed with Meyer Sutton and Abraham Sutton to attempt to influence Internal Revenue Agent Lawrence Ostrow, an officer or employee of the Internal Revenue Service in an official action involving the audits of the short year corporate tax return of Sutton and Sutton, Ltd., from July 21, 1967 to August 31, 1967, and the corporate tax return of Sutton and Sutton, Ltd., for the fiscal year ended August 31, 1968, to issue a no change report with respect to the above-specified returns, in return for the Respondent offering Ostrow money in the amount of $1,250.00.

Paragraph IV alleged:

> Between September 1, 1970 and September 22, 1970, Respondent orally represented to Meyer and Abraham Sutton owners of his client, Sutton and Sutton, Ltd., that Internal Revenue Agent Lawrence Ostrow had agreed to accept $2,000.00 in connection with the audit of Sutton and Sutton, Ltd., for the short year corporate tax return of Sutton and Sutton, Ltd., from July 21, 1967 to August 31, 1967, and the corporate tax return of Sutton and Sutton, Ltd., for the fiscal year ended August 31, 1968, matters administered by the Internal Revenue Service, when he knew or should have known in the exercise of due diligence that Mr. Ostrow had agreed to receive $1,250.00 in connection with such audits.

The conduct alleged in Paragraph II and III paralleled the charges contained in the Second and First Counts of Indictment 70 Cr. 1104 filed against Mr. Harary in the United

States District Court for the Southern District of New York on December 23, 1970 (6a-9a). Thus, Count One charged Harary and the Suttons with having conspired to bribe Ostrow and Count Two with having bribed him in violation of 18 U.S.C. §201(b). The Third Count alleged that the $1,250.00 payment also constituted the lesser-included offense of paying a gratuity in violation of a separate section of the Federal Criminal Code (18 U.S.C. §§201(f)).

On October 4, 1973, a hearing was held before an Administrative Law Judge at which the transcript of the testimony at the criminal trial was stipulated by the parties to be the testimony of the relevant witnesses as if the same had been called to testify at the administrative hearing.

On February 20, 1974, the Administrative Law Judge rendered his "Initial Decision" which denied Plaintiff Harary's motion to dismiss the Complaint and ordered him permanently disbarred from further practice before the Internal Revenue Service for violating the Treasury Department regulations as charged in the Complaint (253a).

On March 18, 1974, plaintiff appealed said decision to the Secretary of the Treasury pursuant to Section 1071 of Treasury Department Circular No. 230 and again sought dismissal of the complaint. Plaintiff sought, in the alternative, to reduce the disbarment to a suspension from practice for a reasonable period. On June 17, 1974, the Secretary of the Treasury affirmed the Administrative Law Judge's

decision to disbar Plaintiff Harary from further practice before the Internal Revenue Service (262a). Said decision on Appeal constituted final agency action within the meaning of 5 U.S.C. §704 for which plaintiff had no other adequate remedy in any court except for the relief sought below.

On December 30, 1974, plaintiff filed his Complaint seeking judicial review of the administrative determination (271a). Plaintiff's Complaint alleged that the Treasury Department was collaterally estopped from seeking a redetermination of the allegations and charges contained in the paragraphs II & III of the Complaint filed by the Director of Practice (hereafter called the administrative complaint), since the precise issues determined pursuant to those paragraphs were put in issue and determined in the criminal trial of United States v. Harary, 70 Crim. No. 1104 (United States District Court, Southern District of New York) which trial resulted in a Judgment of Acquittal as to Counts 1 and 2 and and Order dismissing Count 3. See United States v. Harary, 457 F. 2d 471 (2nd Cir. 1972). That, the Judgment in the criminal trial was a verdict of acquittal by reason of entrapment perpetrated by agents of the Internal Revenue Service. And, that the subsequent institution of the Disciplinary Proceedings by the entrapping agency amounted to bad-faith harassment in violation of Harary's constitutional rights and a blatant perversion of governmental power.

Plaintiff's complaint stated further that the allegation of fact contained in Paragraph IV of the administrative Complaint did not constitute a violation of the regulation purportedly breached (31 C.F.R. 10.22 (C)) and was not conduct for which he could be disbarred or suspended from practice before the Internal Revenue Service. Finally, that section 31 C.F.R. 10.22 (C) is unconstitutionally vague under the Fifth Amendment to the United States Constitution when applied to the facts alleged in Paragraph IV.

Plaintiff's complaint prayed that the district court (1) declare the action of the Secretary of the Treasury, in affirming the disbarment of Harary, to be erroneous as a matter of law; (2) enter an Order dismissing the Complaint filed by the Director of Practice of the Office of the Secretary of the Treasury and (3) permanently enjoin the Secretary of the Treasury from disciplining Harary for the matters alleged in the administrative Complaint and (4) provide such other and further relief as is deemed just and proper. Defendant's answer, for all practical purposes, admitted the material factual obligations of the complaint and asserted that the administrative determination was correct as a matter of law (276a).

Cross motions for summary judgment were subsequently filed (280a,285a) and on July 28, 1974 the court below granted summary judgment for the defendant. In doing so Judge Griesa, like the administrative agency before him, denied

the applicability of the doctrine of collateral estoppel in this case, upheld the Internal Revenue Service's right to institute the disciplinary proceedings against Harary despite the entrapment perpetrated by that agency and upheld the applicability of Section 10.22 (c) to the unique facts of this case (288a).

B. The Underlying Criminal Proceedings

To resolve the issues raised on this appeal, it is essential to review the underlying facts as they were finally adduced at the criminal trial. Only by doing so can it be ascertained what issues were litigated and definitively determined in the prior criminal proceedings.

Indictment 70 Cr 1104 charged defendants Charles R. Harary, Meyer Sutton and Abraham Sutton in three counts with conspiring to bribe Internal Revenue Agent Lawrence Ostrow (count 1), with having bribed that agent (count 2) and with having given a gratuity to that agent (count 3) in connection with the audit of the corporate tax returns of Sutton and Sutton, Ltd. for the fiscal years ending August 31, 1967, and August 31, 1968. The only payment in question occurred on September 22, 1970, and the amount was $1,250.00. Prior to the commencement of the first trial of this indictment, on May 17, 1971, upon the Government's motion, the Court severed the case as to defendants Meyer and Abraham Sutton. See United States v. Harary, et al, 329 F. Supp. 1404 (S.D.N.Y. 1971). The Government then proceeded to trial against Harary on the three

counts of the Indictment.

At no time throughout the first trial did Harary contest the fact that he had paid Ostrow $1,250.00 on September 22, 1970, nor did the defense seek to refute the Government's proof that this was done with the specific intent to influence Ostrow's audit of the income tax returns of Sutton and Sutton, Ltd. Indeed, Harary specifically admitted that this was the purpose of the bribe in his post-arrest statement made in the Offices of the United States Attorney, which admission was introduced through the testimony of Inspector Harold Wenig of the Internal Revenue Service (13a-14a). The thrust of the entire defense was that a bribe had occurred but that Harary had been entrapped into committing the crime. At no time did the defense attempt to dispute the factual elements necessary to establish the crime of bribery under 18 U.S.C. 201(b). (17a-19a).

After both sides rested the defense moved for a dismissal of the gratuity count (count 3) on the grounds that the evidence adduced at trial could rationally only support a verdict of guilty of bribery or an acquittal by reason of entrapment. The Government opposed this motion and it was denied by the Court (15a-16a).

In summation, the Government specifically recognized that the only disputed issue in the case was the defense of entrapment. In his argument to the jury, the prosecutor quite accurately stated what was in fact conceded by the

defense and what single issue was left to be determined by the jury. (19a-21a).

> [E]verything is conceded in this case except for one thing. There's only one issue in this case. It is conceded that Agent - that Mr. Harary committed a crime by paying $1,250.00, this money right here, to an agent of the Internal Revenue Service, a public official, a person who is working for the Treasury Department, in order to influence that agent's actions in connection with an audit examination.
>
> It is conceded that he commited a crime despite the fact that they called character witnesses to testify that he has a reputation for being a law-abiding citizen.
>
> What this case is about, ladies and gentlemen, is simply this:
>
> A man was arrested for committing a crime. He confessed to committing a crime. He has decided that he now does not want to cooperate with the Government but he wants not to be punished for the crime which he has committed and the only out he has is to try to convice you through an eloquent attorney that the Government engaged in entrapment, instigated, initiated this commission of the crime by Mr. Harary.
>
> If you think that the Inspection Service and what they conducted here, what they did here is a perversion of Governmental power, as Mr. Fawer puts it, then I agree that you should acquit this defendant.

At the conclusion of summations and prior to the Court's charge to the jury, Harary renewed his motion for the removal of the gratuity count from the jury's consideration. Again the Government opposed this motion and again it was denied by the Court (21a-22a). The Court then instructed the jury on the defense of entrapment: that if it convicted on the bribery count it should acquit the defendant on the gratuity count and only if it acquitted on the bribery count should

the jury consider the defendant's guilt on the gratuity count. After the charge, Harary again objected to the submission of the gratuity count to the jury (23a). After two days of deliberation, during which the entrapment charge was twice reread to the jury, and then sent into the jury room in written form, the jury advised the Court that it could not agree on a verdict and it was discharged in the early evening of May 21, 1971 (2a)*.

The retrial of the case commenced on June 1, 1971, and concluded on June 4, 1971, with a jury verdict of acquittal of Mr. Harary on the conspiracy count (count 1) and the bribery count (count 2) and a verdict of guilty on the gratuity count (count 3) (213a-214a). The retrial was in all respects a rerun of the first trial. The Government's proof was identical, the defense again conceded the factual elements supporting the bribery charge and relied exclusively upon establishing entrapment; the focus of both summations was again the entrapment defense; and the Court's charge to the jury was a repetition of its charge at the first trial (205a-212a).**

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* Just prior to the jury's being discharged, the Court, in colloquy with counsel, noted that the jury was obviously deadlocked over whether the defense of entrapment had been established.

** Throughout the retrial, Harary again sought to have the gratuity count withdrawn from the jury's consideration (23a-25a, 190a-192a, 215a).

MR. FAWER: I would then, your Honor, finally, make the argument that I made at the end of the case the last time and I make it again now. [cont'd.]

It is against this backdrop that the trial testimony must be considered.

(1) The Trial Testimony

The Government's only witnesses were Revenue Agent Lawrence Ostrow, the recipient of the $1,250.00 in question, and Inspector Harold Wenig who testified as to Harary's post-arrest admissions. With the exception of several character witnesses the defense called no one to testify on its behalf, relying instead on the testimony of the Government's witnesses to establish the defense of entrapment.

Mr. Harary is a certified public accountant among whose clients is Meyer and Abraham Sutton and their corporations. One of these corporations is Sutton and Sutton, Ltd., an importer of ready-made wearing apparel with offices at 1204 Broadway, New York, N.Y. The other corporations are for the most part retail discount stores on the lower east side of New York City.

The Government and the defense both agree that the jury cannot bring a verdict of guilty on count 2 which is the bribery count and count 3, the gratuity count. It's clear that the case has now for the second time been submitted, introduced in evidence, presented to the jury as, clearly, a case of bribery with intent to influence. The only possibility that that intent did not exist is if the entrapment defense negates it. I submit that it is nothing but confusing to a jury to permit the gratuity count to go to the jury. I recognize that it permits a compromise verdict but it seems to me that simply confuses the jury by putting to them a proposition of law which has to be superimposed on a state of facts which does not exist on this record and, for that reason, your Honor, I submit that the gratuity count should at this point be taken away from the jury. (190a-191a).

In early August 1970, Inspector Wenig of the Inspection Service, the security branch of the Internal Revenue Service (160a-161a) was advised by an informant that the Suttons were known to make payoffs to city employees. After checking with the Audit Division and learning that no audit of any Sutton enterprise tax return was underway and that none was scheduled to commence in the near future, Wenig requested that an audit of Sutton and Sutton, Ltd. be commenced to determine whether in fact an overture would be made (175a-181a). When asked by defense counsel whether it was part of his function to cause such an audit to be initiated, Wenig replied, "This could conceivably come under our intensified integrity program" (179a). Not satisfied with having created the need for an audit, Wenig specifically requested that the audit be assigned to Revenue Agent Lawrence Ostrow, an agent who had previously worked with Wenig in Inspection Service initiated audit investigations. Thereafter, Wenig summoned Ostrow to his office and told him he had requested the initiation of the audit and Ostrow's assignment to the case. He advised Ostrow that the Suttons were "possibly pay-off people;" and they had "cash business;" to be on guard for "any possible overture" and to conduct a "normal audit." (55a-62a, 162a-163a, 181a-184a)

Ostrow contacted the Suttons' accountant, Charles R. Harary, advised him of the audit, and set up an appointment for September 1, 1970, at the offices of Sutton and Sutton, Ltd. (37a). On the morning of September 1, they met and after

initially engaging in some general conversation unrelated to the audit, Harary furnished Ostrow with copies of the relevant corporate returns as well as other miscellaneous documents. When Ostrow requested copies of the tax return of the other Sutton enterprises as well as their individual returns, Harary agreed to make copies available to him (64a-65a). During that morning Ostrow noted that the Sutton and Sutton, Ltd. tax return reflected the corporation's capitalization as $199,000.00.* He told Harary he would need substantiation of this item and asked where this money had come from. Harary replied that he understood it came from Israel and that he would supply substantiation of this the next time they met (65a-66a).

At the end of the morning Ostrow joined Harary for lunch at a nearby restaurant. While at lunch Harary mentioned to Ostrow that recently he had been propositioned by some prostitutes loitering in front of a hotel in the area and asked Ostrow if he wanted to walk over to see if they were still around. Ostrow agreed. When they reached the location the women were not there. Turning to Ostrow, Harary then said, "Anytime you would like the services of a prostitute just let him know and he could arrange it . . . that he would pick up the tab on it . . ." (41a-42a, 66a-69a).

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*The corporation was formed in July 1967 and the balance sheet portion of the tax return reflected opening capital of $99,000.00 and paid-in capital of $100,000.00.

Upon returning to the office Ostrow resumed his audit. By mid-afternoon it became apparent that he could not complete the audit that day and since Harary was to supply additional documentation, it was agreed that the audit would be continued on September 22, 1970. Harary arranged to deliver copies of the additional tax returns requested to Ostrow on September 4, 1970. (69a-73a).

When Ostrow had completed his work for the afternoon Harary asked Ostrow to join him for a drink at a nearby restaurant. At the bar Harary produced a camera he had brought with him from the Suttons' office and offered to give it to Ostrow or sell it to him at cost. Ostrow declined the offer. (42a-43a, 73a-76a).

The following morning Ostrow reported to Wenig what had occurred, namely, the offer of the prostitute and the camera. He also told Wenig about the $199,000.00 item on the return and his brief conversation with Harary concerning it. Ostrow was then instructed to cancel his appointment with Harary for September 4th which he did by telephoning Harary from Wenig's office. (44a, 76a-77a).

On two occasions between September 2, 1970, and September 22, 1970, Ostrow was summoned to Inspector Wenig's office. At these meetings Wenig supplied Ostrow with copies of the Suttons' individual tax returns which he had requested on his own initiative from the Federal Records Center. (78a-79a, 184a-187a). He also told Ostrow about a call he had made to

the Israeli Consulate concerning that country's restrictions on the exportation of currency (93a-96a, 165a-166a, 187a-188a). He advised Ostrow that as on their previous cases together Ostrow would carry a concealed tape recorder with him when he continued the audit on September 22nd. Wenig instructed Ostrow "not to broach or suggest a bribe in any way;" "to do nothing to lead them on;" "to treat it as a normal audit . . . as though it was the first time I was going out to do my work." (80a-82a).

On the morning of September 22nd Ostrow returned to Wenig's office where he was outfitted with a concealed microphone and tape recorder* and was then driven to the office of Sutton and Sutton, Ltd. (82a-83a, 166a-167a).

The audit resumed that morning with Harary supplying Ostrow with all the documentation he had previously requested (46a, 83a-85a). The agent's inquiry quickly focused upon the $199,000.00 item** and the substantiation proffered by

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* A typewritten transcript was made of the lengthy tape recording of the September 22 conversations between Ostrow, Harary and the Suttons. This transcript was prepared jointly by the prosecution and defense counsel prior to trial. Because large segments of the tape were admittedly inaudible, the Court would not admit the transcript of the tape in evidence at either trial. It was used extensively, however, in cross examination of Agent Ostrow. (103a-109a).

** Ostrow conceded that this $199,000.00 balance sheet item could in no way affect the adequacy of the income taxes paid by the corporation. At best it could only lead to an income tax investigation of the person who had supplied the money to the corporation (87a-88a). According to Ostrow, the records of the corporation reflected that the source of one half of this money was the mother and sister of the Suttons.

Harary (46a-48a). Three letters to the Suttons were shown to Ostrow to establish the source of this money. The first, dated several years prior to the corporation's receipt of the money in 1967, concerned the writer's unsuccessful efforts to liquidate the large estate left in Syria by Hillel Sutton, father of Meyer and Abraham Sutton, after the Sutton family was forced to flee that country. The second letter, written by one Jack Nasser, counsel to the Republic of the Phillippines in Israel, concerned his efforts to liquidate the estate and how expensive it was to accomplish this task. The third letter, also from Nasser, reflected that through Arabs in Syria he had been able to liquidate the estate at a very great expense and that the balance of approximately $200,000.00 was being forwarded. It was this money that the Suttons claimed was the source of the $199,000.00 in question (85a-93a). After Ostrow read the letters, he began to question Harary about the substantiation, at which time Harary suggested that he speak directly to one of the Suttons since he knew nothing more about it. Meyer Sutton was then brought in and attempted to explain to Ostrow (47a-49a, 96a-97a).

Sutton explained that his parents and their family had been forced to emigrate from Syria to Israel because they were Jews, leaving behind a large estate (97a). Thereafter, efforts were made through third parties to bring out of Syria whatever money they could salvage from the estate. This was ultimately accomplished by Nasser who paid a great deal of

money to Arabs to transmit $200,000.00 out of Syria (97a, 127a-128a). Sutton explained the difficulty in getting further substantiation of the transmittal from Arabs living in Syria and Ostrow replied that he was aware of the situation (98a-99a). Sutton then asked what further proof he required. Ostrow stated that he needed proof of how the money was transmitted, such as an affidavit from the Arab who had transmitted it or a cancelled check from Syria. He also suggested that the deposit of the $199,000.00 into the corporate account might contain a notation as to the bank upon which the check was drawn. He was shown the deposit slip but such information was not on it. With regard to Ostrow's suggestion that an affidavit be obtained, Mr. Sutton said this could not be done as it would seriously endanger the life of the person who transmitted it because he was an Arab in Syria helping a Jew. (99a-101a).

Ostrow pointed out to Sutton that having examined the tax returns of their other enterprises and realizing they were cash businesses, it made it all the more important that the $199,000.00 be substantiated.* He advised Sutton that if the item was not satisfactorily substantiated he would have to impose the tax due on the $199,000.00 upon the Suttons as owners of the corporation. (101a-103a). Ostrow went on to suggest that even if they produced the affidavit and the cancelled check this would not necessarily satisfy him. (104a-107a).

* Ostrow stated that if in fact the $199,000.00 represented the residual of the Syrian estate, it would have been non-taxable income and that it was the non-taxable status of this money that he was questioning. (127a).

Sutton then stated, "I tell you we are going to get you all that you want and we want to ask you to cooperate as much with us because it's a very delicate point . . ." To which Ostrow replied, "I see it is. I see it is." (110a-111a). Shifting the tenor of his appeal, Sutton then asked Ostrow, as a Jew himself, to understand their position, to which Ostrow replied even though he was a Jew he had his job to perform.(111a-113a). Sutton then suggested that Ostrow accept the substantiation shown to him. Ostrow replied that to do so would "put him out on a limb." Sutton responded that he didn't want Ostrow to say something that wasn't true but to accept the substantiation offered and explain the situation to his superiors. Again Ostrow replied that to do so would "put him out on a limb." (113a-123a). Sutton then again appealed to their mutual religious background and Ostrow replied, "You keep saying that. Okay, you want me to help you out but, like I say, helping you out is saying something that isn't so . . . then I am putting myself, I am extending myself over on the limb." (123a-124a). Sutton then suggested that Ostrow simply not mention the item in his reprot. Ostrow replied, "Well, we'll think about it . . . that's the only other [sic] than saying that the item is good . . . as long as the item is good, then there is no problem." (125a-126a). Responding, Sutton stated, "I hope that, hope that, hope you [sic] can convince you that the item is good . . ." to which Ostrow replied, "You know we can sit down with what we have

and work it out. That's all I mean as long as we can see that it's a good item then there is no problem" (126a-127a). Their conversation concluded with Ostrow again telling Sutton that if he could not resolve the substantiaion of the $199,000.00 capital item he would have to look into their personal returns. (129a).

Meyer Sutton then left the room and Ostrow and Harary concerned themselved with other facets of the audit until they adjourned for lunch. At this point, as Ostrow admitted, there was no further need for any discussion of the $199,000.00 item; he had called upon the Suttons to produce satisfactory substantiation and there was nothing further for him to do with regard to it until they produced or failed to produce documentation. Moreover, up to this point in time on September 22 no one had offered Ostrow anything of value. In fact, had he then left "there would have been nothing to report back to Inspector Wenig of a criminal nature." (130a-132a).

However, immediately upon returning from lunch, Ostrow again discussed with Harary the type of substantiation he required, and asked him, "so what do you want me to do?" In reply, Harary suggested that the Suttons would give him an affidavit concerning the $199,000.00 which Ostrow declined. Harary then suggested that Ostrow get a letter from the corporation's bank to satisfy him, to which Ostrow replied he couldn't do it and again said, "What do you want me to do?" (50a, 132a-145a).

At this point, according to Ostrow, Harary mentioned, "Maybe we can compensate you with some women or some money" and again Ostrow said, "What do you want me to do?" Harary then "specifically" told him "what he wanted done;" "to accept the item, not to go into it any further and say that it was good." Ostrow then replied, "All right, is this what you want me to do, go on, keep talking as to anything else you want me to do." Harary then suggested, "Maybe a small disallowance to make it look good." Harary then offered Ostrow $250.00 and Ostrow told Harary to "keep talking," "you know what we are talking about; we are talking about $60,000.00 in taxes." Under Ostrow's admitted prodding the price climbed to $1,250.00 which Ostrow agreed to accept. (50a-51a, 145a-152a).

Harary then left the room and returned to advise Ostrow that Al Sutton was going to get the money (52a, 153a). Ostrow and Harary then agreed that the agent would file a no-change report, i.e., a report reflecting no irregularities discovered upon audit to be followed by a letter to the taxpayer that no additional taxes were due for the years audited (52a, 154a-155a). While waiting for the money to arrive Ostrow asked, "Charlie, why did you wait so long to ask me. . ." "Something stopped you" (155a-158a). Subsequently, Harary left the office and returned with the money which he handed over to Agent Ostrow (52a-53a, 158a-160a). One week later Charles Harary was arrested by Inspector Wenig. (168a).

Inspector Harold Wenig testified about the arrest of Harary on September 29, 1970. On that day Harary was taken

to the Office of the United States Attorney where, in the presence of several Assistant United States Attorneys and his own counsel, Harary freely answered a series of questions put to him by Assistant United States Attorney Maloney. (169a-175a).

> Q. What occurred after he advised him of his constitutional rights again?
>
> A. Mr. Harary stated he understood and once again Mr. Maloney continued his questioning of Mr. Harary.
>
> Q. What questions did he ask on this occasion and what responses did Mr. Harary give?
>
> A. He first asked Mr. Harary did he pay a $1,250.00 bribe to Revenue Agent Lawrence Ostrow and Mr. Harary said "Yes" and then Mr. Harary was asked who was instrumental in pushing this bribe and Mr. Harary stated that the Sutton Brothers were behind it and they had asked Mr. Harary, that is, the Sutton Brothers asked Mr. Harary to close the deal and then he was asked why was the bribe paid and Mr. Harary stated that he was giving the Sutton Brothers a blow-by-blow description of what the Revenue Agent was doing during the examination and when the Revenue Agent told Mr. Harary that there could be a possible tax assessment of $60,000.00, he had communicated this fact to the Suttons and Mr. Harary said, since people don't like trouble and if the agent looks long enough he is going to find something wrong, they had decided to pay him.
>
> And Mr. Harary then stated that he and the Suttons felt that after the initial meeting with Revenue Agent Ostrow on September first that the agent was approachable and that was the reason that they had tried this attempt.
>
> Then Mr. Harary was asked who was the one that made the initial overture of the bribe; who was the one that first offered the bribe, and Mr. Harary stated that he was the one that offered the bribe first and not the agent.

> The agent didn't make any pitch for a bribe; that he was the one.
>
> Then he was asked how much money did he ask the Suttons for to pay off the Revenue Agent and Harary stated that when he had spoken to the Suttons, he had told them that the Revenue Agent has agreed to accept $2,000.00 and when Mr. Sutton, Abe Sutton, had come back from the place where he had obtained this $2,000.00, he had given this money to Mr. Harary and Mr. Harary was asked if he kept any of that money for himself and he said "Yes," that he took $750.00 out of that $2,000.00 and kept it for himself, without telling the Suttons what he was doing and without telling the Revenue Agent.

The thrust of the entire cross-examination of Wenig, like that of Ostrow, was solely concerned with a development of the entrapment defense. Thus, Wenig was questioned about his role as a criminal investigator (177a-180a), his specific request that an audit be undertaken and assigned to Agent Ostrow (162a-163a), his direction of Ostrow prior to and during the audit (181a-188a, 76a), and his general efforts since early August 1970 to develop a case against the Suttons (175a-178a). No attempt was made to undermine Harary's post-arrest admissions concerning the bribe and the reasons for it. Finally, [illegible]ugh Wenig, it was established that his only information concerning Harary was his involvement in instant bribe; and although Harary had previously represented taxpayers in their dealings with IRS, Wenig's check of the files had revealed not "the slightest suggestion of a blemish on his record." (188a-189a).*

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* These answers were elicited to establish a lack of "predisposition" on Harary's part to commit the crime charged.

(2) The Summations

As in the first trial (See pp. 10-11, supra) the focus of both summations was the entrapment defense; both defense counsel and the prosecutor expressly recognizing that the jury's verdict was wholly dependent upon a resolution of this single issue. Thus, counsel for Harary stated:

> The crucial issue in this case -- and his Honor will charge you on it -- is whether the idea of a bribe was Harary's from the outset, or whether in fact it was suggested, instituted, intimated or induced by the government's agent.
>
> Unless in your minds and hearts you can say that the government, that the prosecutor has been able to convince you beyond a reasonable doubt that Ostrow didn't solicit the bribe, you must acquit Mr. Harary (192a-193a).
>
> * * *
>
> [Concerning Harary's post-arrest statement]
>
> He admits everything you know to be facts in the case. He admits, number one, he has never done this before. He admits he paid the $1,250.00. He admits that he did it on behalf of the Suttons.
>
> * * *
>
> The whole issue in this case is the question of entrapment and the judge will charge you as clearly as can be on that point and the government's burden on that issue.
>
> By no stretch of the imagination has the government demonstrated, as it must, beyond a reasonable doubt that the defendant would have paid the bribe without the subtle and not so subtle pressure exerted by Agent Ostrow. (198a-199a).

In a summation which sought only to overcome the entrapment defense, the prosecutor argued:

And what is the defense in this case? Character evidence. The government doesn't contend that the defendant Harary had a bad reputation in the community. You hardly go around advertising the fact that you paid a bribe to a government agent.

As for character witnesses, Benedict Arnold could have called George Washington as a character witness.

And what is the other defense in this case? Entrapment. All right. Let's go to this issue and let's go there right now.

* * *

Recall what Harary said to Mr. Maloney in the United States Attorney's office here. He told them that the Suttons told him that if the agent looked long enough he would find something and that is precisely why the bribe was paid here, to avoid Agent Ostrow finding something wrong.

* * *

What did Mr. Harary say to Mr. Maloney all the time in the presence of his attorney? He said that he kept the Suttons apprised of the audit examination, as to what was going on. He said that he kept $750.00 for himself and most importantly, he said that he initiated the bribe offer, not the agent, and that is the issue to decide and the two people who were involved in this case, in this bribe, Agent Ostrow and Harary, both of them told you that it was Harary, Harary who initiated the bribe offer, not the agent.

You heard that from Agent Ostrow on the witness stand and you heard it through his own statement to Mr. Maloney. (202a-203a)

Despite the clarity with which the issue was framed by both counsel, despite the evidence adduced at the trial, despite the consistent theory upon which the case was presented by both parties and the patent irrationality of any

verdict other than one of guilty or not guilty on the bribery count, the Court still submitted the lesser-included offense to the jury over Harary's repeated objection. The jury then returned a verdict acquitting Mr. Harary of conspiring to bribe and bribery, but convicted him of paying a gratuity.

(3) The Appeal

On appeal the Second Circuit reversed the conviction holding that it was improper, over counsel's continued objections, to have submitted the lesser-included offense to the jury because upon the facts adduced and the express theory upon which the case was tried, the jury could not rationally have returned a verdict of not guilty of the greater offense (bribery) and guilty of the lesser offense of paying a gratuity. In the course of reversing the conviction, the Court specifically noted that the only disputed issue submitted to the jury for resolution was whether Harary had been entrapped into paying the bribe. 457 F. 2d at 474, 478 (216a).

ARGUMENT

As developed more fully below, a common thread of error is woven through both administrative decisions and the decision below. The three opinions persist in drawing erroneous conclusions as to the applicability of the collateral estoppel doctrine, the existence of bad faith harassment by an entrapping agency, the type of conduct which constitutes a violation of 31 C.F.R. 10.22(C), and the constitutional infirmity of 31 C.F.R. 10.22(C) as herein applied.

Plaintiff Harary contends that (1) Defendant was collaterally estopped from seeking redetermination of the allegations and charges contained in Paragraphs II and III of the administrative Complaint by virtue of the fact that the precise issues determined pursuant to said Paragraphs were put in issue and determined in the criminal trial, which trial resulted in a Judgment of Acquittal as to Counts 1 and 2 thereof and an Order dismissing Count 3. See United States v. Harary, 457 F. 2d 471 (2nd Cir. 1972); (2) The Judgment in the criminal trial was, in the truest sense, a verdict of acquittal by reason of entrapment perpetrated by agents of the Internal Revenue Service, United States Treasury Department. Thus the subsequent institution of disciplinary proceedings by the entrapping agency amounts to bad-faith harassment in violation of Mr. Harary's constitutional rights and is a blatant perversion of governmental power; (3) The allegations of fact contained in Paragraph IV of the administrative Complaint do not constitute a violation of 31 C.F.R. 10.22(C) and is not conduct for which Plaintiff may be disbarred or suspended from practice before the Internal Revenue Service; and (4) Section 31 C.F.R. 10.22(C), which purports to set forth a standard of conduct, the violation of which constitutes grounds for disbarment or suspension from practice before the Internal Revenue Service, is unconstitutionally vague under the Fifth Amendment to the United States Constitution when applied to the facts alleged in Paragraph IV of the administrative Complaint.

Point I

Defendant was collaterally estopped from seeking to discipline Mr. Harary on the basis of the allegations contained in Paragraphs II and III of the Administrative Complaint since the precise issues to be determined pursuant to said Paragraphs were put in issue and determined in Mr. Harary's favor in the prior criminal trial.

An analysis of the prior criminal proceedings makes perfectly clear that it has been definitely determined that Mr. Harary was entrapped into paying a bribe to Agent Ostrow. Since entrapment is no less a complete defense to these disciplinary proceedings, infra, at pp. 33-42, the doctrine of collateral estoppel precludes relitigation of this issue. This is particularly true when the agency seeking to discipline Mr. Harary is the same agency which engaged in the entrapment.

Collateral estoppel is a judicial rule which operates to prevent redetermination of issues actually litigated between the same parties in a suit on a different cause of action. United States v. Burch, 294 F. 2d 1, 5 (5th Cir. 1961). By virtue of this rule, such an issue is considered as having been put to rest between the parties involved in the initial proceeding; and, as between them, it may not thereafter be redetermined. However for the first judgment to collaterally estop the raising of an issue in the later action, it must actually have been determined in the earlier litigation. "The inquiry must always be as to the point or question actually litigated and determined in the original action;

not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action." United States v. International Building Co., 345 U.S. 502, 505 (1953).

In discussing the application of collateral estoppel in successive prosecutions, the Supreme Court has stated in Ashe v. Swenson, 397 U.S. 436 (1970):

> "Collateral estoppel" is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. Although first developed in a civil litigation, collateral estoppel has been an established rule of federal criminal law at least since this Court's decision more than 50 years ago in U.S. v. Oppenheimer, 242 U.S. 86 (1916).

The Court went on to state:

> "The federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied with a hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." The inquiry "must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings." Sealfon v. United States, 332 U.S. 575, 579 . . .

At the criminal trial of plaintiff the sole defense was one of entrapment, and no attempt was made to refute

the Government's proof of a payment of money or the intent with which it was given. The thrust of the entire defense was that a "bribe" had occurred but that Harary had been entrapped into committing the crime. United States v. Harary, 457 F. 2d 471, 474 (2nd Cir. 1972). Whether the defense had factually established this proposition was the only issue in dispute which the jury was called upon to resolve. In summation the Government specifically recognized this, and both prosecutor and defense counsel expressly acknowledged that the jury's verdict was wholly dependent upon a resolution of this single issue. To put it simply, either Harary bribed Ostrow with the requisite specific intent or he was the victim of an entrapment which negated his criminal intent in all respects. The evidence simply could not rationally support a determination that there was no entrapment and no specific intent to influence Ostrow. Indeed, in reversing Harary's conviction on the gratuity count on the ground that it should not have been submitted to the jury, the Court of Appeals stated: "The only element which distinguishes bribery from giving a gratuity is the specific intent to influence which is required for conviction of bribery. (Citation omitted). Based upon careful examination of the record, it is clear to us that this issue was not disputed in this case." 457 F. 2d 475-476. Thus, the only rational basis for the jury's acquittal of Harary on the bribery and conspiracy counts (the equivalents of Paragraphs

II and III of the administrative Complaint, was that he was the victim of an entrapment.

Since the relevant inquiry in assessing a claim of collateral estoppel is "whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration," Ashe v. Swenson, supra, and inasmuch as the sole issue before the jury was whether Harary had been the victim of entrapment -- which by its verdict on Counts I and II the jury answered in the affirmative -- this issue is now foreclosed from consideration; provided collateral estoppel is applicable to the instant disciplinary proceedings, as we submit it must be.

As to the significance of the jury's verdict on the gratuity count, it was only at the persistent urging of the Government, and over Harary's strenuous objection, that this count was submitted to the jury and an illogical verdict obtained. But the irrationality, brought about solely by the trial tactics of the Goverment*, was righted by the mandate of the Court of Appeals. That same mandate kept intact the rational actions of the jury, namely, Harary's acquittal of the bribery and conspiracy charges. Since the Government was the sole cause for an irrational verdict by the jury on the lesser count, it should not be permitted,

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* In reversing the gratuity count conviction the Court noted the irrational verdict was the product of the government's "misguided trial tactics" (226a).

in the person of the Director of Practice, to use its own malfeasance to undermine the wholly rational verdict of acquittal. Harary fought through two trials to have the issue of entrapment conclusively determined by a jury. He is entitled to the attendant benefits thereof, i.e., foreclosure from further consideration of the only issue necessarily determined by it.

Were this a successive "criminal" prosecution there is no doubt the instant proceeding could not have been instituted. Ashe v. Swenson, supra. But the doctrine of collateral estoppel is no less applicable to bar a subsequent administrative disbarment proceeding which is so clearly punitive in nature. As the Supreme Court noted in reversing an analogous disbarment proceeding for failing to afford petitioner procedural due process, such a proceeding is of a "quasi-criminal nature" the effect of which is to impose a "punishment or penalty" upon the practitioner. In Re Ruffalo, 390 U.S. 544, 550-51 (1968). The Second Circuit ruled similarly in Erdmann v. Stevens, 458 F. 2d 1205 (2nd Cir. 1972). There, the Court stated that the loss of a license is a greater punishment than a monetary fine and hence a disciplinary proceeding against a member of the bar is comparable to a criminal rather than a civil proceeding. Id. at pp. 1209-1210. See also, Ex Parte Garland, 4 Wall 333, 380 (1867); Spenack v. Klein; 385 U.S. 511, 515 (1967); In Re Fleck, 419 F. 2d 1040, 1045 (6th Cir. 1969); In Re Ming, 469 F. 2d 1352, 1355 (7th Cir. 1972).

In Huntington v. Attrill, 146 U.S. 657 (1892), the Supreme Court set forth the conclusive test for determining whether or not the law under which a tribunal proceeds is penal in nature.

> "The test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public or a wrong to the individual." Id. at 658.

Public wrongs, says the Court, are dealt with by penal remedies. Id. The position of the Director of Practice throughout this entire case has been that "the power of disbarment is necessary for the protection of the public in order to strip a man of the implied representation that one who is allowed to hold himself to practice is in good standing so to do." (Brief for Director of Practice in administrative proceedings at p. 17). If, as the Department of Treasury would have us believe, Harary had to be disbarred as a means of guarding the public from him, the inescapable conclusion can only be that the instant disbarment proceedings were penal in nature.

In the leading case of Coffey v. United States, 116 U.S. 436 (1886) the Court had occasion to deal with the conclusiveness of a criminal acquittal after a jury verdict upon a subsequent non-criminal proceeding:

> It is urged as a reason for not allowing such effect to the judgment, that the acquittal in the criminal case may have taken place because of the rule requiring guilt to be proved beyond a reasonable doubt; and that, on the same evidence, on the question of preponderance of proof,

there might be a verdict for the United States, in the suit in rem. Nevertheless the fact or act has been put in issue and determined against the United States; and all that is imposed by the statute, as a consequence of guilt is a punishment therefor. There could be no new trial of the criminal prosecution after the acquittal in it; and a subsequent trial of the civil trial amounts to a substantially the same thing, with a difference only in the consequences following a judgment adverse to the claimant. (116 U.S. at 443).

The Court went on to note:

> This doctrine is peculiarly applicable to a case like the present, where, in both proceedings, criminal and civil, the U.S. is the party on one side and this claimant the party on the other. The judgment of acquittal in the criminal proceeding ascertained that the facts which were the basis of this one, and which are made by the statute the foundation of any punishment, personal or pecuniary, did not exist. This was ascertained once for all, between the U.S. and the claimant, in the criminal proceeding, so that the facts cannot be again litigated between them, as the basis of any statutory punishment denounced as a consequence of the existence of the facts. (Emphasis added). (Id. at 444-455).

Since the decision in Coffey some courts have refused to apply the collateral estoppel doctrine to a second proceeding where the sanctions were purely of a "remedial" quality. See Helvering v. Mitchell, 303 U.S. 391 (1938). But in this proceeding which so obviously threatens punitive sanctions, the doctrine is fully applicable.

> Later Supreme Court cases have approached similar problems by applying the distinction taken in Helvering v. Mitchell, 303 U.S. 391 (1938), between "sanctions that are remedial and those that are punitive." United States ex rel. Marcus v. Hess, 317 U.S. 537 (1943), United States v. National Association of Real Estate Boards, 339 U.S. 485 (1950). According

to the Helvering approach, if the sanction involved in the forfeiture action is "remedial" rather than "punitive," the forfeiture action is a civil action and the "difference in degree of the burden of proof in a criminal and civil case precludes application of the doctrine of res judicata." Helvering v. Mitchell, 303 U.S. at page 397. In applying the Helvering distinction, however, the Supreme Court has characterized the Coffey case as a "civil suit which was punitive in character." United States v. National Association of Real Estate Boards, 339 U.S. at page 493. Thus the Coffey case has never been overruled and has continued vitality as a precedent. United States v. Burch, 294 F. 2d 1 (5th Cir. 1961). United States v. 86.9 Cases, 337 F. Supp. 1355, 1356 (S.D. Fla. 1971).

In McKeehan v. United States, 438 F. 2d 739 (6th Cir. 1971), Judge Weick (concurring) discussed the history and proper applicability of the Coffey doctrine, at 746-747:

> Coffey v. United States, 116 U.S. 436, 6 S. Ct. 437 (1886) sustains the defense of estoppel. There a defendant had been aquitted on criminal charges involving violations of the Internal Revenue laws. Subsequently the Government brought a forfeiture proceeding against the defendant's property, based on the same violations of the Internal Revenue laws. The Court denied forfeiture. The Court said:
>
> > There could be no new trial of the criminal prosecution after the acquittal in it; and a subsequent trial of the civil suit amounts to substantially the same thing, with a difference only in the consequences following a judgment adverse to the claimant. 116 U.S. at 443, 6 S. Ct. 440-441.
>
> The forfeiture of McKeehan's property clearly constitutes punishment of him for violation of the statute; but the Government has precluded itself from inflicting such punishment.
>
> Coffey has been cited as --
>
> > * * * authority for the proposition that if the present defendants had been

> proceeded against criminally on account of the same acts and facts that must be shown in order to sustain this action under the statute of 1890, and had been acquitted, the verdict and judgment of acquittal would have barred a subsequent civil proceeding, based on the same acts and facts, and instituted to enforce a forfeiture * * *. United States v. Zucker, 161 U.S. 475, 478-479, 16 S. Ct. 641, 642 (1896).

The Coffey doctrine, however, has been distinguished and limited. Starting with Stone v. United States, 167 U.S. 178, 186-187, 17 S. Ct. 778, 42 L. Ed. 127 (1897), the Court limited Coffey's application to instances where the second suit, civil in nature, imposed a penalty or penal sanction on the same individual who was previously acquitted of the criminal charge. See, Murphy v. United States, 272 U.S. 630, 632, 47 S. Ct. 218 (1926) where Coffey was held inapplicable because the subsequent civil suit's purpose was prevention, not punishment. In Helvering v. Mitchell, 303 U.S. 391, 397 58 S. Ct. 630, 632 (1938) the Court said:

> That acquittal on a criminal charge is not a bar to a civil action by the Government, remedial in its nature, arising out of the same facts on which the criminal proceeding was based has long been settled. (Emphasis added).

In Johnson v. Wall, 329 F. 2d 149, 151 (4th Cir. 1964), the Court stated that the Coffey doctrine --

> * * * is limited to those situations where the Government seeks to impose a punishment which, though civil in form, is penal in nature and is based upon the same facts as the criminal proceeding.

Although Coffey has been much maligned, United States v. Burch, 294 F. 2d 1, 4-5 (5th Cir. 1961), the case still has vitality within its subsequent restrictions, and we have no authority to overrule it. United States v. One 1956 Ford Fairlane Tudor Sedan, 272, F. 2d 704 (10th Cir. 1959).

It would seem that the instant case falls directly within what is left of the Coffey doctrine. There has been a final determination of the criminal

charges against McKeehan, in that he cannot be prosecuted again on the charge arising out of these same facts, and this determination is equivalent to finding him not guilty.

> The subsequent civil proceeding, in the nature of forfeiture, can be characterized only as an action seeking to impose punishment, or a penal sanction, against McKeehan. The forfeiture proceeding is not remedial in any sense, but is quasi-criminal in nature. One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 85 S.Ct. 1246 (1965) (Emphasis added).

There is nothing to suggest that the sanctions the Department of Treasury imposed in these proceedings are remedial in nature. Quite the contrary, it is punishing Mr. Harary for his conduct while dealing with Revenue Agent Ostrow. Mr. Harary's position, here, as it was at the criminal trial and the Administrative hearing, is that he was entrapped by Ostrow into paying the bribe. The verdict at trial upheld this defense and the doctrine of collateral estoppel necessarily relieves Mr. Harary of the need to establish it anew.

Just as the Internal Revenue Service may not entrap a taxpayer or his representative into committing a criminal act in order to secure his conviction, so too is the Office of the Director of Practice precluded from seeking to discipline such a representative when it has been conclusively established that the latter has been entrapped into making an illegal payment to a Revenue Agent. The rationale which underlies the entrapment doctrine in criminal prosecutions, see Sorrells v. United States, 287 U.S. 435 (1932); Sherman v. United States, 356 U.S. 369 (1958) and United States v. Russell, 411 U.S. 423 (1973), is equally applicable to administrative disciplinary proceedings.

Thus, in Patty v. Board of Medical Examiners, Sup. 107 Cal. Rptr. 473 (1973), the California Supreme Court held the defense of entrapment available in administrative proceedings at which revocation or suspension of a license to practice a profession or business is at issue:

> As we point out, the majority of our sister states which have passed on the legal question at issue recognize entrapment as a defense in administrative disciplinary proceedings, and we have concluded that this weight of authority rests on a firm foundation of sound public policy. As we shall explain, the purposes underlying the recognition of an entrapment defense -- the preservation of the dignity of the legal process and of public confidence in it -- are as applicable to the conduct of administrative proceedings as to criminal trials; administrative officials, no less than police or other law enforcement officers, subvert the fair administration of justice when, instead of pursuing legitimate methods of prevention and detection of crime, they apprehend wrongdoers through schemes designed to foster or induce the commission of criminal conduct. Accordingly, we now hold that an individual may raise the defense of entrapment in an administrative proceeding at which his right to practice a profession or business is at stake. Id. at 474.

In commenting upon the policy supporting the applicability of the defense in just such administrative proceedings, the Court aptly stated:

> Although the defense of entrapment may find application in other administrative proceedings, it is particularly important when, as here, a single agency combines both investigative and adjudicative powers. If such an agency rejects entrapment as a defense, it in effect authorizes its investigators to entrap, and encourages a shift of resources of such acts. Public confidence in the administration of justice by such an agency forming its investigative role employs methods contrary to "sound public policy" and "good morals." Id. at 479.

In the case at bar, it is the very agency which engaged in the entrapment of Mr. Harary which also disciplined him for the illegal conduct initiated by its agents. To permit such an occurrence simply makes a mockery of the rule of law. The only conclusion which logic as well as fundamental fairness will permit is that the defense of entrapment was available to Mr. Harary in these proceedings; and as his entrapment was conclusively established in the criminal proceeding, it constitutes a complete bar to the charges alleged in Paragraphs II and III of the Administrative Complaint.

Point II

> In view of the definitively established entrapment engaged in by the Internal Revenue Service to induce Mr. Harary to commit the illegal acts which were the basis of his disbarment, the institution of disciplinary proceedings by the entrapping agency constituted harassment of Mr. Harary and a blatant attempt to subvert the judgment of a Federal Court.

Wholly apart from the fact that the defendant was collaterally estopped as a matter of law from proceeding with the charges contained in Paragraphs II and III of the Administrative Complaint, it is also clear that that proceeding was simply an attempt to harass Mr. Harary and, as such, constitutes a blatant affront to the integrity of our system of justice. A federal jury has acquitted Mr. Harary of bribery and conspiracy to bribe. In so doing that jury concluded that the Internal Revenue Service had engaged in overreaching; it had induced the commission of a federal crime. On appeal this Court has reversed the wholly irrational

portion of the jury's verdict and ordered the Indictment dismissed. Notwithstanding this conclusive determination, and despite the entrapment engaged in by his own agency, the Director of Practice had the effrontery to commence the instant disciplinary proceeding.

In the case of Bender v. Board of Regents of the State of New York, 30 N. Y. S. 2d 779 (1941), a similar effort to indirectly undermine the judicial process was quashed by the Court. There, a disciplinary proceeding was instituted against Bender, a licensed dentist, on the charge that he had aided and abetted Reeb in the practice of denistry which the latter was not licensed to practice. Reeb had been acquitted in a criminal proceeding and thereafter disciplinary proceedings were instituted against Bender. In reversing the determination of the state administrative agency, the Court stated:

> We do not disagree that the acquittal of Reeb in the criminal court is no bar to the prosecution of petitioner [Bender] before a disciplinary tribunal for complicity in Reeb's unlawful practice. The judgment of acquittal in the criminal court is not conclusive in this proceeding by force of any general doctrine of res adjudicata.
>
> We are convinced, however, that the dental board having failed to convict Reeb in the criminal action, is now attempting indirectly in a friendly forum of its own selection, to reverse the jury's verdict. It is our conclusion that neither the dental board nor the respondents should endeavor in this manner to destroy the integrity of the judgment in the criminal case. That judgment should stay their hand from further prosecution of petitioner on the issues there litigated. Their attempt to render the judgment abortive suggests persecution rather than an honest endeavor to revoke the license of an unworthy member of the profession. (30 N.Y.S. 2d at 784) (Emphasis added).

The policy there articulated is all the more convincing in this case because the earlier adjudication involved Harary, not as in Bender, a third party. Thus, to paraphrase the Court in Bender, it is obvious that here the Internal Revenue Service, having failed to convict Harary in the criminal action, next attempted indirectly, in a friendly forum of its own selection, to reverse the jury's verdict. An agency of the United States should not be permitted in this manner to destroy the integrity of a dispositive judgment in the prior federal criminal case. That judgment should stay its hand from further prosecution of Mr. Harary on the issues there litigated. And the instant attempt to render the judgment of acquittal abortive truly suggests persecution of Mr. Harary rather than an honest endeavor to disbar or suspend from practice an unworthy member of the accounting profession.* For this reason alone, the plaintiff's prayer for relief should be granted.

Point III

The allegations of fact contained in Paragraph IV of the Complaint do not constitute a violation of 31 CFR 10.22 (c) and is not conduct for which plaintiff may be disbarred or suspended from practice before the Internal Revenue Service. In addition, 31 CFR 10.22 (c) which purports to set forth a standard of conduct the violation of which allegedly constitutes grounds for disbarment or suspension from practice before the Internal Revenue Service, if applied to the facts of this case, is unconstitutionally vague under the Fifth Amendment to the United States Constitution.

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* As stated earlier, the state and national accounting societies which have disciplinary power over Mr. Harary consider the judicial proceeding dispositive of the need for any disciplinary action.

No portion of the Administrative Complaint better demonstrates the extremes to which the Internal Revenue Service will go in an effort to harass Mr. Harary than the charge contained in Paragraph IV. Indeed, the use there sought to be made of the Regulations borders on the ludicrous, and it is only the terribly serious consequences which prevent our being amused at this attempted perversion of defendant's disciplinary power.

The regulation upon which the charge in Paragraph IV is predicated is 31 CFR §10.22 which provides:

> §10.22 Diligence as to accuracy
>
> Each attorney, certified public accountant, or enrolled agent shall exercise due diligence:
>
> * * *
>
> (c) In determining the correctness of oral or written representations made by him to clients with reference to any matter administered by the Internal Revenue Service.

The circumstances of plaintiff's alleged offense under this provision as set forth in the Administrative Complaint are that Mr. Harary failed to exercise due diligence in determining the correctness of oral or written representations made by him to his clients when he represented to the Suttons that Agent Ostrow had agreed to accept $2,000.00 in connection with the audits of their corporation when he knew or he should have known in the exercise of due diligence that Mr. Ostrow had agreed to receive $1,250.00 in connection with such audits.*

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* At the trial it was established that Ostrow agreed to accept a $1,250.00 bribe, but that Harary advised his client the amount was $2,000.00, of which he kept $750.00 and gave Ostrow $1,250.00

First, it is more than obvious that such alleged misconduct was not intended to be encompassed by this provision of the Regulations. Any attempt to bring such conduct within the scope of this provision is not only an unreasonable application of the provision, but would be inconsonant with the purpose of the Regulation itself. Surely there is no requirement to exercise due diligence in determining the correctness of representations to clients in furtherance of an alleged illegal course of conduct. To suggest otherwise would necessarily mean that where a Revenue Agent has made overtures seeking the commission of criminal acts with reference to a matter administered by the Internal Revenue Service, a practitioner could be disbarred or suspended for failing to exercise due diligence in correctly representing such criminal overtures to his client. Not only does this interpretation require the practitioner to become a participant in the illegal scheme fostered by the Agent, it in fact encourages the effectuation of criminal conduct. By no stretch of the imagination can such a requirement have been contemplated in the promulgation of this provision, yet in this instance such an interpretation is actually being asserted by the defendant.* Simply stated, Section 10.22, in its entirety, is concerned with assuring that taxpayers' representatives accurately report information to the Internal

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* Under this type of interpretation, if the Suttons had wished to transmit a $2,000.00 bribe offer to the Revenue agent and Harary had sought to effectuate the illegal transaction at a lesser price, Harary could be disbarred under Section 10.22 (b) which requires similar due diligence be exercised in making correct representations to the Internal Revenue Service.

Revenue Service as well as their clients in the normal lawful conduct of business involving the Internal Revenue Service. This regulation was not intended to deal with any part of an alleged illicit transaction as grounds for disbarment. Rather, such conduct is fully dealt with in Section 10.51 of the Regulations. Moreover, the Administrative Complaint wholly overlooks the fact that but for Ostrow's entrapment, there would have been no payment and hence nothing to misrepresent. The Director of Practice cannot be permitted to use his agency's illegal conduct as the catalyst for a charge that Mr. Harary violated the regulation.

Second, to the extent that 31 CFR 10.22 (c) purports to set forth a standard of conduct the violation of which allegedly constitutes grounds for disbarment or suspension from practice before the Internal Revenue Service, it is so vague as applied in this case that it is void under the Fifth Amendment to the United States Constitution. No one disputes the broad power of the Secretary of the Treasury to regulate the practice of attorneys, certified public accountants, and enrolled agents before the Internal Revenue Service. But the right to practice one's profession is a very precious part of the liberty and property of an individual practitioner, and such a right is protected from arbitrary infringement by the Fifth Amendment to the United States Constitution which forbids the deprivation of liberty or property without due process of law. See In Re Ruffalo, supra, Barsky v. Board of Regents, 347 U.S. 442, 459 (1954), Justice Black (dissenting).

> Fundamental fairness of course requires that people be given notice of what to avoid. If the purpose of a statute is undisclosed, if the legislature's will has not been revealed, it offends reason that punishment should be meted out for conduct which at the time of its commission was not forbidden to those who wished to observe the law. This requirement of fair notice that there is a boundary of prohibited conduct not to be overstepped is included in the conception of 'due process of law.' A statute which fails to give such forewarning is, in constitutional terms, void for 'indefiniteness.'

Winters v. New York, 333 U.S. 507, at 524, Justice Frankfurter (dissenting).

Regulations promulgated by an administrative agency under an act of Congress imposing punitive sanctions upon a violation of such regulations are governed by similar requirements of definiteness as are statutes defining criminal action. Such regulations must be explicit and unambiguous and must adequately inform those who are subject to them just what conduct on their part will render them liable to the punitive aspects of the regulation. Jordan v. DeGeorge, 341 U.S. 223, 231 (1951). Thus, although these disciplinary regulations do not impose criminal sanctions, the vagueness doctrine is fully applicable since the potential consequences of the proceeding mandate that Mr. Harary be afforded the full panoply of procedural rights embodied in the due process clause of the Constitution, In Re Ruffalo, supra, not the least of which is that he be given fair notice of precisely what type of conduct subjects him to disbarment.

Under the regulations in question it is perfectly clear that a certified public accountant is on notice that he risks disbarment if he bribes, or attempts to bribe a Revenue Agent,

or engages in the other form of conduct specifically prescribed in Section 10.51. But nothing in Section 10.22(c) puts an individual subject to the Regulations on notice that if he misrepresents to his client the amount of a bribe agreed to by a Revenue Agent, who had himself suggested the bribe, that he might be disbarred for failing to "exercise due diligence" with respect to the representation of a "matter administered by the Internal Revenue Service." Moreover, it stretches credulity to suggest that a bribe solicited by a Revenue Agent, or even one proposed by a taxpayer's representative, is a "matter administered by the Internal Revenue Service" as that phrase is used in Section 10.22(c). Even assuming such conduct could ever be made a legitimate basis for disbarment, due process requires that the regulations make clear that such conduct falls within the ambit of its proscription. In this sense Section 10.22(c) is impermissibly vague and hence constitutionally defective.

CONCLUSION

For the foregoing reasons it is respectfully submitted that Plaintiff-Appellant Harary's motion for summary judgment should have been granted in all respects and, accordingly, this Court should enter an order directing the lower court (1) to declare the action of the Secretary of the Treasury in affirming the disbarment of Plaintiff Harary to be erroneous as a matter of law; (2) to enter an Order dismissing the Complaint filed by the Director of Practice of the Office of the Secretary of the Treasury; and (3) to permanently enjoin the Secretary of the Treasury from disciplining Plaintiff Harary for the matters alleged in said Complaint.

Respectfully submitted this 6th day of December, 1976.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief have been served on Frederick Schaffer, Assistant U. S. Attorney, U. S. Courthouse, Foley Square, New York, New York, this 8th day of December, 1976.

Michael S. Fawer